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January 29, 2020

VIA ELECTRONIC FILING

Ms. Molly Dwyer
Office of the Clerk
Ninth Circuit Court of Appeals
95 Seventh Street
P.O. Box 193939
San Francisco, CA 94119

Re: *Heat & Frost Insulators and Allied Workers, Local 5 v. NLRB*
Ninth Circuit Case No. 19-70585
Citation to Supplemental Authority Pursuant to FRAP 28(j)
***Apogee Retail LLC*, 368 N.L.R.B. No. 144 (Dec. 16, 2019)**

Dear Ms. Dwyer:

In this case, the Board overturned a prior decision, *Banner Estrella Medical Center*, 362 N.L.R.B. 1108 (2015), *enf. denied on other grounds*, 851 F.3d 35 (D.C. Cir. 2017), in which a prior Board had held that blanket rules requiring confidentiality during open investigations are presumptively unlawful.

In *Apogee*, the Board reversed this holding noting that there are often confidentiality concerns associated with other legal regimes. Particularly, the Board noted that the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration have issued guidance on confidentiality issues during investigations. The Board held that the *Banner Estrella* decision was inconsistent with the guidance issued by those agencies on that subject. *See Apogee*, 368 N.L.R.B. No. 144, slip op. at 5-6 & n.8.

This is just another illustration in which the Board considers the application of statutes other than the National Labor Relations Act.

Under the Board's theory in this case, the Charging Party's view as to the application of this guidance (not even rules) would be disregarded and irrelevant.

Sincerely,

/s/ David A. Rosenfeld

David A. Rosenfeld

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cc: Proof of Service Attached

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 29, 2020, I electronically filed the foregoing **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 29, 2020.

/s/ Karen Kempler

Karen Kempler